(16)

No. 05-502

FILED
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SUPREME COURT, U.S.

In The
Supreme Court of the United States

BRIGHAM CITY,

Petitioner,

vs.

CHARLES W. STUART,
SHAYNE R. TAYLOR, and SANDRA TAYLOR,

Respondents.

On Writ Of Certiorari
To The Utah Supreme Court

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed: Oct. 17, 2005
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The following opinions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

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FIRST JUDICIAL DISTRICT COURT
BOX ELDER COUNTY, STATE OF UTAH

Case No. 001100454

BRIGHAM CITY, PLAINTIFF

vs.

STUART, CHARLES W., DEFENDANT

DOCKET ENTRIES

DATE	RECORD NUMBER	PROCEEDINGS
07/26/2000	1	Filed: Citation [for Contributing to Delinquency of a Minor, Furnishing Alcohol to Minors, Disturbing the Peace, and Intoxication (issued 07/23/2000)]
07/27/2000	–	Case filed
07/27/2000	2-3	Filed: Arrest Summary Report
	* * *	
07/28/2000	5	Appearance of Counsel [Rod Gilmore]
	* * *	
08/16/2000	9-10	Filed: Information [charging Contributing to Delinquency of Minor (class B), Contributing to Delinquency of Minor (class B), Disorderly Conduct (class C), and Intoxication (class C)]
	* * *	

09/26/2000	14	Filed: Waiver of Personal Appearance, Entry of Not Guilty Plea, [Request for Continuance] and Demand for Jury Trial
	* * *	
11/02/2000	23-24	MINUTES for pretrial conference before Judge Judkins: Mr. Gilmore informs court that he will be filing motion to suppress and requests a motion hearing; MOTION HEARING/STATUS CONF scheduled for 3/22/01 at 1:30 PM.
12/15/2000	25-26	Filed: Motion to Suppress Evidence and Request for Hearing
12/15/2000	28-35	Filed: Memorandum in Support of Motion to Suppress
12/29/2000	36-39	Filed: Plaintiff's Response to Motion to Suppress
01/23/2001	42-43	Filed: Request to Submit
02/02/2001	44	Filed: Objection to Notice to Submit for Decision
	* * *	
03/13/2001	53-61	Filed: Supplemental Memorandum in Support of Motion to Suppress

03/22/2001	62-65	MINUTES for Motion to Suppress Hearing before Judge Judkins: Defendant is not present because he is on active duty with the army; Counsel meet with judge in chambers. Opening statements by Mr. Gilmore. Officer Jeff Johnson, BCPD, is called, sworn and testifies. Plaintiff's exhibits #1 and #2 are offered and received. Cross examination. Defendant's exhibits #1 through #9 are offered and received. Re-direct. Re-cross examination. Re-direct. Re-cross examination. City rests. Defense rests. Closing arguments by Mr. Gilmore. Closing arguments by Mr. Merrell. Response by Mr. Gilmore. The court makes its findings and grants the motion to suppress. Anything seized after the entrance into the home may not be used as evidence in this trial
05/02/2001	76-79	Filed: Proposed Order on Motion to Suppress (refused)
05/08/2001	66-73	Filed: Objection to Defendant's Proposed "Order on Motion to Suppress Evidence" and Motion to Enter Plaintiff's Alternative Proposed Order.
05/11/2001	74-75	Filed: Notice to Submit Plaintiff's Motion to Enter Plaintiff's Alternative Proposed Order
05/18/2001	80-82	Filed: Order on Motion to Suppress Evidence (signed by Judge Judkins on 5/18/2001)

05/23/2001	83-86	Filed: Objection to Plaintiff's Objection to Defendant's Order and Objection to Plaintiff's Corrected Order
06/11/2001	87-88	Filed: Notice of Filing of Petition for Permission to Appeal Interlocutory Order
07/17/2001	91	Filed: Utah Court of Appeals Order Granting Petition for Permission to Appeal from an Interlocutory Order
07/17/2001	96-97	Filed: Request to Trial Court Executive for Transcript of Proceedings (Merrell)
	* * *	
09/13/2001	98	Filed: Reporter's Notice of Filing of Transcript
	* * *	

FIRST JUDICIAL DISTRICT COURT
BOX ELDER COUNTY, STATE OF UTAH

Case No. 001100460

BRIGHAM CITY, PLAINTIFF

vs.

SHAYNE R. TAYLOR, DEFENDANT

DOCKET ENTRIES[1]

DATE	PROCEEDINGS
07/27/2000	Judge JUDKINS assigned
07/27/2000	Case filed
07/27/2000	Filed: Arrest Summary Report
	* * *
07/28/2000	Filed: Appearance of Counsel [Rod Gilmore]
	* * *
08/16/2000	Filed: Information [charging Contributing to Delinquency of Minor (class B), Furnishing Alochol to Minors (class B), Disorderly Conduct (class C), and Intoxication (class C)] *(part of record, but no docket entry)*
	* * *

[1] The trial court did not paginate this record.

09/26/2000 Filed: Waiver of Personal Appearance, Entry of Not Guilty Plea, [Request for Continuance] and Demand for Jury Trial

* * *

11/03/2000 MINUTES for pretrial conference before Judge Judkins: Mr. Gilmore informs the court that he will be filing a motion to suppress and requests a motion hearing date; MOTION HEARING/STATUS CONF scheduled for 3/22/2001 at 1:30 PM

12/29/2000 Filed: Plaintiff's Response to Motion to Suppress

03/22/2001 MINUTES for Motion to Suppress Hearing: Counsel meet with Judge in chambers. Opening statements by Mr. Gilmore. Officer Jeff Johnson, BCPD, is called, sworn and testifies. Plaintiff's exhibit #1 and #2 are offered and received. Cross examination. Defendant's exhibits #1 through 9 are offered and received. Re-cross examination. Re-direct. Re-cross examination. City rests. Defense rests. Closing arguments by Mr. Gilmore. Closing arguments by Mr. Merrell. Response by Mr. Gillmore. The court makes its findings and grants the motion to suppress. Anything seized after the entrance into the home may not be used as evidence in this trial.

05/08/2001 Filed: Objection to Defendant's Proposed "Order on Motion to Suppress Evidence" and Motion to Enter Plaintiff's Alt. Proposed Order

05/18/2001 Filed: Order granting Motion to Suppress evidence signed by Judge Judkins 5/18/01

05/23/2001	Filed: Objection to Plaintiff's Objection to Defendant's Order and Objection to Plaintiff's Corrected Order
06/11/2001	Filed: Notice of Filing of Petition for Permission to Appeal Interlocutory Order

* * *

FIRST JUDICIAL DISTRICT COURT
BOX ELDER COUNTY, STATE OF UTAH

Case No. 001100456

BRIGHAM CITY, PLAINTIFF

vs.

SANDRA A. TAYLOR, DEFENDANT

DOCKET ENTRIES[2]

DATE	PROCEEDINGS
	* * *
07/27/2000	Filed: Arrest Summary Report
07/27/2000	Case filed
	* * *
07/28/2000	Filed: Appearance of Counsel [Rod Gilmore]
	* * *
08/15/2000	Judge JUDKINS assigned
08/16/2000	Filed: Information [charging Contributing to Delinquency of Minor (class B), Contributing to Delinquency of Minor (class B), Disorderly Conduct (class C), and Intoxication (class C)]
	* * *
09/26/2000	Filed: Waiver of Personal Appearance, Entry of Not Guilty Plea, [Request for Continuance], and Demand for Jury Trial
	* * *

[2] The trial court did not paginate this record.

11/02/2000 MINUTES for pretrial conference: Mr. Gilmore informs court that he is going to file a motion to suppress and requests a motion hearing date. MOTION HEARING/STATUS CONF scheduled for 03/22/2001 at 1:30 PM.

12/29/2000 Filed: Plaintiff's Response to Motion to Suppress

03/22/2001 MINUTES for motion to suppress hearing: Counsel meet with Judge in chambers. Opening statements by Mr. Gilmore. Officer Jeff Johnson, BCPD, is called, sworn and testifies. Plaintiff's exhibit #1 is offered and received. Plaintiff's exhibit #2 is offered and received. Cross examination. Defendant's exhibits #1 through 9 are offered and received. Re-direct. Re-cross examination. Re-direct. Re-cross examination. City rests. Defense rests. Closing arguments by Mr. Gilmore. Closing arguments by Mr. Merrell. Response by Mr. Gillmore. The court makes its findings and grants the motion to suppress. Anything seized after entrance into home may not be used as evidence in trial.

03/23/2001 Note: Motion to Suppress hearing minutes modified

* * *

05/08/2001 Filed: Objection to Def's Proposed "Order on Motion to Suppress Evidence" and Motion to Enter Plaintiff's Alternative Proposed Order

05/18/2001 Filed: Order granting Motion to Suppress Evidence (signed by Judge Judkins 5/18/01)

05/23/2001 Filed: Objection to Plaintiff's Objection to Defendant's Order and Objection to Plaintiff's Corrected Order

06/11/2001 Filed: Notice of Filing of Petition for Permission to Appeal Interlocutory Order

* * *

09/13/2001 Filed: Transcript of Motion to Suppress Hearing

* * *

UTAH COURT OF APPEALS

Case No. 20010479-CA

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
	*	* *
06/11/2001	2	PETITION for Interlocutory Appeal
	*	* *
07/12/2001	4	PETITION for Interlocutory appeal granted
	*	* *
09/13/2001	9	NOTICE of transcript filed with trial court
	*	* *
10/03/2001	15	RECORD INDEX filed
10/03/2001	16	RECORD filed
	*	* *
11/30/2001	19	BRIEF OF APPELLANT filed
	*	* *
02/15/2002	22	Brief of Appellee lodged
02/25/2002	23	BRIEF OF APPELLEE filed
	*	* *
04/12/2002	25	REPLY BRIEF OF APPELLANT filed
04/19/2002	26	CALENDARED – set for oral argument

07/02/2002	27	SUBMITTED on oral argument
07/11/2002	28	Exhibit filed
10/03/2002	29	OPINION filed
10/25/2002	30	APPEARANCE OF COUNSEL, AAG Jeffrey S. Gray for Brigham City

* * *

12/05/2002	32	NOTICE – Petition for Writ of Cert filed
03/08/2003	33	Record sent to Supreme Court
04/03/2003	34	NOTICE – cert granted
04/16/2003	35	REMITTITUR/TRANSFER

UTAH SUPREME COURT

Case No. 20021004-SC

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
11/01/2002	1	ORDER granting motion for 30-day extension to file Petition for Writ of Certiorari
11/01/2002	2	MOTION for 30-day extension of time for filing petition for writ of certiorari
12/04/2002	3	WRIT OF CERTIORARI FILED
12/05/2002	4	Receipt for payment
01/02/2003	5	MOTION to extend time for filing opposition to petition for certiorari
01/03/2003	6	ORDER granting respondents' motion for extension of time; respondents are ordered to file their brief on or before 2/5/03
02/06/2003	7	RESPONSE to writ; original and 4 copies filed. Additional 5 copies filed.
02/18/2003	8	CIRCULATED
02/19/2003	9	BRIEF ON DISC FILED
03/26/2003	10	ORDER granting petition for writ of certiorari filed.
03/28/2003	11	RECORD – CERTIORARI called for; emailed Court of Appeals to send record

03/28/2003	12	RECORD FILED: 3 volumes of pleadings, 1 transcript 3/22/01, 1 envelope. [Located 4C]
03/31/2003	13	SET briefing schedule: Appellant's brief due on or before 5/13/03

* * *

05/13/2003	16	REQUEST for stipulated 30-day extension of time until 6/12/03 to file brief of appellant
06/09/2003	17	MOTION to extend time for filing appellant's brief to 7/14/03
06/12/2003	18	ORDER granting extension of time; appellant's brief to be filed on or before 7/14/03.
06/16/2003	19	ORDER granting extension returned – undeliverable; resent 6/16/03
07/14/2003	20	APPELLANT'S BRIEF FILED
08/18/2003	21	MOTION to extend time for filing appellees' brief to 9/17/03
08/22/2003	22	ORDER granting stipulated motion for an extension of time to file brief to 9/17/03
09/16/2003	23	MOTION to extend time for filing appellees' brief to 10/17/03
09/25/2003	24	ORDER granting extension; appellees' brief to be filed on or before 10/17/03.
10/17/2003	25	APPELLEES' BRIEF FILED
11/19/2003	26	REQUEST for stipulated 30-day extension to file appellant's reply brief to 12/19/03.

12/19/2003	27	APPELLANT'S REPLY BRIEF FILED
03/25/2004	28	CALENDARED: Oral argument set for 9:30 6/09/04 before CMD, MBD, MJW, JNP, REN
06/09/2004	29	SUBMITTED on oral argument
12/21/2004	30	SUPPLEMENTAL AUTHORITY to appellant's brief
02/18/2005	31	OPINION filed. Affirmed; Opinion by J. Nerhring; CH Durham and J. Parrish concur; J. Durrant concurs and dissents with opinion; ACF Wilkins concurs with J. Durrant's opinion. [2002 UT 13]
03/02/2005	32	MOTION for 14-day extension of time to 3/18/05 for Brigham City to file petition for rehearing.
03/09/2005	33	ORDER granting extension of time for Brigham City to file petition for rehearing by 03/18/05.
03/18/2005	34	PETITION FOR REHEARING filed by Brigham City.
03/21/2005	35	CIRCULATED
03/31/2005	36	ERRATA TO BRIEF: Brigham City submits replacement for page 3 of petition for rehearing
05/12/2005	37	LETTER inviting appellees to respond to petition for rehearing

05/27/2005	38	MOTION for 14-day enlargement of time to 6/9/05 to file appellees' response to petition for rehearing; hard copy filed 6/01/05
05/27/2005	39	ORDER granting appellees' motion for extension of time; response to petition for rehearing is due to be filed on or before 6/9/05
06/09/2005	40	MOTION for 7-day enlargement of time to 6/16/05 to file response to petition for rehearing. Hard copy filed 6/10/05.
06/10/2005	41	ORDER granting appellees' stipulated motion for an enlargement of time to file response to petition for rehearing by 6/16/05.
06/16/2005	42	ANSWER TO REHEARING PETITION filed.
07/18/2005	43	ORDER denying petition for rehearing pursuant to Rule 35 of the URAP.
08/04/2005	44	REMITTED: 3 vol. pleadings, 1 transcript, 1 envelope returned to First District Court, Brigham City Dept.
08/09/2005	45	MOTION to recall remittitur filed by appellant. Corrected copy filed 8/11/05.
08/29/2005	46	NOTICE filed by Brigham City for defendants to appear or appoint counsel (their previous counsel has been disbarred); Brigham City will be petitioning US Supreme Court for writ of certiorari.

08/30/2005	47	ORDER granting motion to recall remittitur.
	*	* *
10/05/2005	49	APPEARANCE OF COUNSEL: Michael P. Studebaker files his entry of appearance on behalf of Sandra A. Taylor.
10/24/2005	50	PETITION FOR WRIT OF CERTIORARI filed with US Supreme Court 10/17/05 by Brigham City.
10/26/2005	51	Courtesy copy of US Supreme Court petition for writ of certiorari
11/14/2005	52	RECORD called for. Email sent to district court: Please return record to Utah Supreme Court.
11/23/2005	53	APPEARANCE OF COUNSEL: Michael Studebaker appears as counsel for Charles Stuart and Shayne Taylor.
11/23/2005	54	RECORD called for. Sent email to district court: Please return record to SC; one request was made previously but the record remained in the district court to allow an attorney to review it for a matter in the federal courts.
11/25/2005	55	Courtesy copy of response to petition for writ of certiorari filed on 11/16/05.
12/20/2005	56	RECORD FILED: remittitur recalled per notice of 8/30/05; 3 vols. pleadings, 1 transcript 3/22/01, 1 envelope containing videotape. [located 4-D]

01/23/2006	57	US SUPREME COURT CERT GRANTED on 1/6/06; case no. 05-502

* * *

[1]

IN THE FIRST JUDICIAL DISTRICT COURT
BOX ELDER COUNTY, STATE OF UTAH

Case Nos. 001100454, 001100456 & 001100460

STATE OF UTAH, PLAINTIFF

vs.

CHARLES W. STUART, SHAYNE R. TAYLOR
and SANDRA A. TAYLOR, DEFENDANTS

REPORTER'S TRANSCRIPT

MOTION TO SUPPRESS HEARING

MARCH 22, 2001 – 1:40 P.M.

HONORABLE CLINT S. JUDKINS PRESIDING
FIRST DISTRICT COURT COURTHOUSE
BRIGHAM CITY, UTAH

Reported by: RODNEY M. FELSHAW, CSR, RPR

APPEARANCES

For the Plaintiff:

JAMES E. MERRELL
Brigham City Attorney

For the Defendants:

ROD GILMORE
Attorney at Law

BRIGHAM CITY, UTAH

MARCH 22, 2001, 1:40 P.M.

[2]

THE COURT: Let's get this on the record. This is the case of Brigham City versus Charles W. Stuart, Sandra A. Taylor and Shayne Taylor. Mr. Gilmore, you represent all three defendants, is that correct?

MR. GILMORE: That is correct, Your Honor.

THE COURT: Mr. Merrell, you represent the state?

MR. MERRELL: I do. Are all three defendants here?

MR. GILMORE: Charles Stuart is not here. He's on active duty in the armed services.

THE COURT: Very well. Mr. Merrell, you had a question in chambers as related to standing. The court indicated that quite frankly there are no – as far as procedurally there are actually no facts before the court that have been stipulated to.

MR. MERRELL: At this time the city would stipulate to standing.

THE COURT: Very well. That takes care of that. Then, as it goes to the rest of the motion, Mr. Gilmore, I'll hear you first. Even though this is the state's burden, it is your motion and I'll give you that opportunity.

MR. GILMORE: All right. Do you want me to call witnesses?

THE COURT: No, just an opening statement.

MR. GILMORE: Your Honor, as far as the defendants' position goes, our feeling is that the police

officers had no [3] basis to enter the home. They actually didn't have any basis to go beyond the front corner of the home and down the driveway where the camper was. They didn't have any basis to enter into the back yard and they didn't have any basis to enter into the home subsequent to that.

We believe that there is a reasonable expectation of privacy in all three of those areas and that in order to have a warrantless entry the police need to have, number one, probable cause. Number two, some sort of exigent circumstance that would justify entry. We don't believe that that has ever been shown, that there be some sort of exigent circumstance that required an immediate entry into any of those areas.

We do believe that the law is quite clear in that regard. Absent those things there can be no entry. As a matter of fact, assuming that what the officers could see going on in the back of the house, they had to be able to see it from the back yard and they really didn't belong in the back yard in the very first place.

THE COURT: Thank you. Mr. Merrell, your opening statement.

MR. MERRELL: I'm not going to make one, Your Honor.

THE COURT: Very well. Call your first witness.

MR. MERRELL: Thank you, Your Honor. Brigham City would call Jeff Johnson.

[4]

JEFF JOHNSON,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MERRELL:

Q. Good afternoon, Officer Johnson. Will you state your name for the record.

A. Jeff Michael Johnson

MR. GILMORE: Excuse me. Can you move out of the way a little?

MR. MERRELL: Certainly. Sorry about that.

Q.(BY MR. MERRELL) Jeff Michael Johnson?

A. That's correct.

Q. How are you employed, Jeff?

A. As a police officer with Brigham City.

Q. And back on the date in question in this matter, it was the 23rd and 24th. I guess it was in the very early morning hours of July 23rd of last year. Were you also so employed at that time?

A. Yes, sir, I was.

Q. What, if anything, is your position as a Brigham City police officer?

A. At that time I was a corporal in the patrol division.

Q. And are you still a corporal in the patrol division?

A. I'm actually a corporal in the investigations division at [5] this point.

Q. All right. Officer Johnson, how long have you been a police officer?

A. At this time, when this happened, 16 years.

Q. All right. And tell me a little bit, or tell the court, about your training in investigating criminal matters?

A. I went through police officer academy and have attended the required 40 hours plus every year of certified training. A lot of that has been in alcohol areas. DUI, how to detect intoxicated persons. How to defuse – in regards to this situation, how to defuse situations. We've been through anger management training, conflict management training. Training in how to handle people who are both intoxicated and emotionally disturbed. You know, I've received nearly 2,000 hours of training on the job regarding issues such as this and how to handle them.

Q. Okay. Officer Johnson, you said that you had some training on the job. With respect to your experience on the job, have you had – you say you've had 16 years experience. Has that been all in the patrol division?

A. Yes.

Q. And during that time – except for your recent entry into the investigative division?

A. That's correct.

Q. During the 16 years have you investigated domestic issues [6] involving alcohol?

A. So many that I couldn't begin to count. Hundreds and hundreds. Probably thousands.

Q. All right. Have you investigated domestic issues involving alcohol that occur in the early morning hours?

A. Yes, frequently.

Q. Have you investigated issues involving altercations between people residing in the same residence?

A. Frequently.

Q. All right. Officer Johnson, on this day, on the 23rd of July of last year, you were dispatched to a residence in Brigham City, is that correct?

A. That's correct.

Q. All right. Why, if you remember, were you dispatched there?

A. We received a complaint of a loud party or altercation occurring from neighbors, other residents, that we responded to.

Q. Were you certain as to which residence it was you needed to respond to?

A. Yes. The residence was identified by the caller.

Q. And do you remember where that was?

A. 1074 Orchard Drive in Brigham City.

Q. All right. And were other officers on duty at that time, as you remember?

[7]

A. Yes, there were. There were three other officers working that night.

Q. Do you remember who they were?

A. Sergeant Ken Broadhead was the shift supervisor on duty. Officer Mike DeRyke and Officer Trent Gunn were the DUI cars out on the DUI shift.

Q. By DUI cars, they were working under the federal DUI grant program and doing DUI enforcement late at night?

A. That is correct.

Q. Are they also available to respond when needed?

A. Yes. They always assist on backup calls. Calls that need backup of this nature that could be a problem.

Q. Was there a reason on this call that you believed there was backup needed or was the dispatch out to all of the different officers on duty at that time?

A. Based on my experience and our collective experience, whenever you respond to a possible party in progress call you have a real problem with people who are under age drinking fleeing the residence. It is good to have a number of officers there in an attempt to secure the scene. Otherwise you have, and I've had this experience, 20, 30 kids running through back yards at three o'clock in the morning, jumping fences and creating a bigger problem than we started with.

Q. Certainly. So, Officer Johnson, were you the first to respond to the residence in your recollection?

[8]

A. Officer DeRyke and I arrived at the same time and parked down the street from the residence.

Q. Were you in different vehicles?

A. Yes, we were. We arrived at the same time. We both parked our vehicles on the corner of Holiday and Orchard. We never drive right up in front of these houses because, obviously, there's an officer safety concern. And, plus, once again if they see us before we get in position we can have a bigger problem than we started with.

Q. All right. Approximately how far from the residence is the corner, the intersection, where you parked?

A. There is one house in between the corner and the house we're talking about at 1074 Orchard.

Q. All right. Did you exit your vehicle at that time?

A. I exited my vehicle and walked over to where Officer DeRyke was exiting his vehicle.

Q. Was he parked in approximately the same area as you were?

A. Yeah. We were parked behind each other.

Q. All right. Upon exiting your vehicle did you observe anything?

A. Immediately I heard loud yelling coming from the east. It was detectable all the way from the intersection.

Q. Was east in the direction towards the residence at 1074 Orchard Drive?

A. That is correct.

[9]

Q. All right. And what, if anything, was in your experience the feeling of this loud yelling?

A. From that point it was pretty muffled. Officer DeRyke and I both stood momentarily trying to determine whether it was a fight or whether it was a party or what kind of noise was being generated at 3 o'clock in the morning that we could here [sic] all the way down at the intersection.

Q. All right. At sometime thereafter did the other officers, Officer Gunn and Officer Broadhead arrive?

A. Yes. Officer DeRyke and I moved away from the intersection prior to that. We went to the northwest corner of the residence where this noise was coming from. We were standing on the curb/gutter area and observing the house, listening to what was going on. We knew Officer Gunn and Sergeant Broadhead were enroute, so we remained there waiting for them.

Q. All right. Approximately how long did you stay there at the residence on the northwest corner prior to the time that they arrived?

A. Momentarily. A minute or two at most. They were right behind us.

Q. During that time were you able to observe anything else as you were standing out on the curb and gutter area there at the residence?

A. Observe, no. We could see lights on in the home. We [10] could hear things, but didn't observe anything.

Q. By observe, I mean with your senses?

A. Okay. Yeah. There was yelling coming from inside the house. We could hear some thumping. It was really unusual. And we also heard people say get off me and – if I can refer back to my notes for the second thing that we heard. There was one other statement that was clearly heard out there. Oh, stop, stop. We heard people yelling stop, stop. Then after that it was get off me.

Q. Was it difficult to determine, or could you determine, where exactly within the house or outside the house these noises were coming from?

A. It was loud, but we couldn't see what part of the house it was coming from. In fact, the front part of the house was relatively dark. You could see lights on towards the rear of the home. The front room was dark. The drapes were pulled open. You could see lights on in the kitchen, which was behind the dining area.

Q. Later on, as you entered the home, you determined that was the kitchen, but I take it you weren't able to tell if that was the kitchen at that time?

A. No. But then it was just lights on behind the front room.

Q. All right. At some point thereafter did Officer Gunn and Sergeant Broadhead then arrive?

[11]

A. Yeah. We all four stood there on the corner conversing momentarily about what we were hearing coming from the house.

Q. What, if anything, was decided about how to proceed at that point?

A. We decided there was a problem inside. Obviously this wasn't something the neighbors were going to tolerate. Secondly, it sounded like there was an altercation occurring, some kind of a fight.

Q. At that point, at that very point, based on your experience and training, did you have a belief that you felt to be reasonable, based on your training and experience, that there was a safety issue involved either for yourself or for the occupants of the home?

A. Definitely. For us to walk away, to leave the scene at that time when we could hear people yelling for help inside, saying get off, stop, and hearing the thumping and crashing, there was no way in the world we could turn away and walk away at that point. We'd been called there by complaining neighbors. And you could tell there was an altercation occurring. You know, I see no way that we couldn't have been derelict in our duties had we left there.

Q. I guess what you could have done, and perhaps the defense would suggest, is you could have simply walked up to the front door, knocked on the door and have the individuals come to the door and respond and have a discussion at to what was **[12]** occurring inside the house, is that correct?

A. Yeah. But that brings up an extreme officer safety issue.

Q. You could have done that?

A. Yeah, we could have done that. I wouldn't do that, though, put myself and other officers in danger.

Q. Is there a reason why?

A. Yes. The officer safety issue I just related to. If somebody is being assaulted inside, that also puts us in danger, in jeopardy. The way I look at this is the way we've been trained. That is that we try to gather as much information as possible and act in the most prudent manner possible to keep everyone, including ourselves, safe.

You know, to walk up to a front door and pound on the door – hypothetically, say this was a rape, the rapist would flee out the back.

Q. Certainly.

A. We needed more information than we had at that point to continue in a safe manner.

Q. Would there, in your training and experience, be any possibility of increased danger to a person in the back of the house were you to knock on the door in the front of the house?

A. In some situations, definitely, no question.

Q. In this situation did you believe that that could have [13] occurred here?

A. It crossed everybody's mind. We all spoke about it and decided to proceed in the manner we did.

Q. All right. Officer Johnson, how did you proceed? Which officers went where, if you remember?

A. I think all four of us went to the front of the home. We stood by the edge of the windows and tried to look inside and see if we could ascertain what was going on. We could see nothing, although we could hear more clearly.

MR. MERRELL: Your Honor, may I approach the witness?

THE COURT: You may.

Q. (BY MR. MERRELL) Officer Johnson, I have a photograph here. Do you recognize that?

A. Yeah. That is the front porch of the home we're speaking of.

Q. Do you remember who took that photograph?

A. Sergeant Broadhead.

MR. MERRELL: Mr. Gilmore, will you stipulate to the introduction of this photo or I can call Sergeant Broadhead?

THE COURT: Wait a minute, counsel. What, now?

MR. MERRELL: Not the introduction, but stipulate – I'm asking if Mr. Gilmore will stipulate to the basis of this photograph being fairly representative of the front of the house. I will speak about the photograph more.

[14]

THE COURT: Mr. Gilmore, are you willing to stipulate to that?

MR. GILMORE: I'll stipulate to that foundation.

THE COURT: Very well.

Q. (BY MR. MERRELL) Officer Johnson, when you arrived at the front of the house was this as the front of the house appeared?

A. Yes.

Q. All right. Anything on the front of the house that appeared to you to possibly indicate the presence of drinking occurring inside the house?

A. We all, and myself, noticed the beer bottle sitting on the front ledge of the front window, which is unusual. People don't usually leave their trash in the front of the house like that.

Q. And in your training and experience, the presence of something like this, did that heighten your concern at all?

A. Yeah. I immediately began to think alcohol. There was probably an alcohol problem here. Which experience based too, this time of the morning, this kind of problem, the high percentage, approaching a hundred percent, is alcohol or drugs related.

MR. MERRELL: Your Honor, if I could move for the introduction and admission of exhibit one.

THE COURT: Any objection to that?

[15]

MR. GILMORE: No objection, Your Honor.

THE COURT: It will be received.

Q. (BY MR. MERRELL) Officer Johnson, we were going to get into exactly what the officers did. Where, to your recollection, did the officers go after that?

A. At that point the supervisor, which was Sergeant Broadhead, indicated to Trent Gunn to stay at the front

door and cover the front door while we proceeded to the rear, which is where all the noise was coming from.

Q. All right.

A. And we being Officer DeRyke, myself and Sergeant Broadhead.

Q. Okay. So yourself, Officer DeRyke and Sergeant Broadhead went to the east of the home?

A. Yes. We went to the front corner on the east edge of the home and stood there peering down the driveway, trying to ascertain where this noise was coming from. It was loud and it was tumultuous. There was a fracas going on somewhere either in the back yard or back of the home.

Q. So as you proceeded to the driveway area, still in line with the front of the house, at that point were you able to continue to investigate and make a determination, make a further determination, as to where the sound was coming from?

A. Yeah. From that point it was obvious to us that it was coming from the rear of the home. It was loud enough that we **[16]** were concerned it might be outside and not in the home. We decided to, you know, investigate where it was coming from. We were trying to locate this fight.

Q. Again, would it have made sense, in your experience and training, at that point, with reasonable suspicion that a fight was occurring in the back yard of the house, to knock on the front door?

A. No.

Q. All right.

A. There would be no sense in that at all.

Q. Officer Johnson, at that point did you proceed with the other two officers down the driveway?

A. Yes, sir, we did.

Q. All right. At some point, as you were walking down the driveway, could you see into the back yard?

A. We took up tactical positions near the back fence and from angles on the back fence you could see a portion of the back yard.

Q. All right. Describe the type of fence that was on the east side and the back yard of the house there, if you could?

A. To my recollection it was a wooden fence with slats nailed on the inside and outside of the center boards, creating a slat type fence, where from angles you can see through and from other angles you can see through.

Q. And as you took up that position on the outside of the [17] fence there were you able to see anything through the fence?

A. Yes, sir.

Q. What if anything did you see?

A. Two juvenile males sitting on a picnic bench in the rear yard of the residence.

Q. In your training and experience approximately how old would you say they were?

A. They were the 14, 16, 17 year age, right in there. High school age.

Q. In your training and experience, once again is there any chance that these individuals back there could have been over 21 years?

A. Absolutely not.

Q. And what, if anything, were they doing back there?

A. They were consuming alcohol out of beer bottles.

Q. They had beer bottles in their hand?

A. Yes.

Q. Actively drinking the beer bottles?

A. Yes. In fact, at one time one of the comments they made while we were standing there was drink up.

Q. You were close enough to hear their conversation at that time?

A. Umm, 12 feet.

Q. All right.

A. Closer than you and I.

[18]

Q. Okay. What, if anything, besides drink up did you hear the two juveniles speaking about?

A. The only other distinctive comment I heard was one of them said he's had too much to drink. They seemed to be referring to the noise we could hear going on.

Q. All right. Let's go back to that. At that time, when you were outside the fence at that time, were you able to continue to hear any sort of noise or altercation – what

appeared in your experience and training to have been an altercation still emanating from the back portion of the home?

A. Definitely. We could still hear it. It was just as severe as when we arrived and was still ongoing.

Q. At that point did you feel as though there was a necessity for either your safety or the other officers' safety or any of the occupants of the home to enter into the back yard at that time?

A. Definitely. There was somebody involved in a fight in that home and we felt like we needed to go in and make sure that somebody wasn't being assaulted, killed, molested, yeah.

Q. In addition to that, did you also, as a result of seeing the juveniles, who appeared in your experience to be juveniles drinking out of alcoholic beverage containers, did that appear to be a plain view violation of the law?

A. Yes, it was.

[19]

Q. All right. So at that time was there an entry made into the back portion of the yard?

A. Yeah. We spoke in a manner – we were more concerned about the ongoing fight than we were the drinking juveniles. Obviously drinking juveniles were not an immediate concern. Obviously there was a violation of the law there, but it wasn't why we were entering into the back yard and it wasn't why we were proceeding in the manner we were proceeding. Our primary concern was still the fight. So at that point we determined that

Sergeant Broadhead would contain the two juveniles momentarily while Officer DeRyke and I continued to pursue wherever this fight was coming from.

Q. All right. And as you entered into the back yard what, if anything, did you see as far as the layout of the land in front of you?

A. Umm, we were on a cemented patio area. There was a picnic table on that. There were some lawn chairs adjacent to that. And there was alcohol containers on top of the picnic table and the two juveniles were sitting there. I went ahead and walked past them. I was the first one into the back yard. I walked right past the juveniles. The only thing I said to them was stay there. I moved to where once again this fracas was occurring.

MR. MERRELL: Your Honor, may I approach?

THE COURT: You may.

[20]

Q. (BY MR. MERRELL) Officer Johnson, Have you seen that before?

A. Yes, sir.

Q. Does that accurately depict what you observed when you entered into the back yard area of the residence at 1074 Orchard Drive?

A. I glanced at this and this is what it appeared to look like to me.

Q. There were the two juveniles sitting there?

A. Yes, the two juveniles were sitting there. Realize that I walked past this with the intent of going to the

fight. This appears to be the same as it was of what I saw, but I was only there momentarily.

MR. MERRELL: All right. Any objection to that?

MR. GILMORE: No.

MR. MERRELL: The City would move to introduce and admit plaintiff's exhibit number two.

THE COURT: It will be received.

Q. (BY MR. MERRELL) Officer Johnson, once you were on that patio area there, I take it the house was to the left of you?

A. Actually, to the right.

Q. To the right?

A. I went through the gate and turned to the right. We were on the back corner of the house. The house extended to the west from us.

[21]

Q. Okay. And what, if anything, were you able to observe on the back of the house there? Were there windows, doors?

A. Windows. There were two windows between me and the door. There could have been three. Two lighted windows. And then there was a door with a dim porch light on over that which would help illuminate the juveniles we saw. And a screen door going into the back of the house.

Q. Was the screen door opened or closed?

A. It was shut.

Q. Was the door that – the solid door on that door also opened or closed?

A. The interior normal house door was open.

Q. Was open?

A. Yes.

Q. All right. As you passed by these windows were you able to see anything in the windows as you passed by, if you remember?

A. Once again I stopped because of the safety concern for us. I looked into one of the windows just from standing. I was about three feet away from it. On an angle through that window I could see a juvenile being restrained by four adults.

Q. All right.

A. And they were – there was obscenities flying and yelling. And the juvenile was trying to break free. The [22] adults were trying to restrain him. The adults were saying things like calm down, settle down to him. His fists were doubled up – his hands were doubled into fists and they had ahold of his wrists trying to restrain him. And they had him pushed up against a white refrigerator that was in.

Q. Were you able to see this through the window or through the door?

A. Through the window. You could see this through the window.

Q. At some point did you proceed to the door?

A. I then walked past the next window, which was a little window over the sink. I believe that's what we determined after I got in there. Then I moved to the doorway and looked through the door.

Q. All right. What could you see through the door?

A. At that point I watched the juvenile get one of his hands free. And there was an adult gentleman in there with a white shirt on. The juvenile swung his fist and landed a punch on the nose and mouth area of the adult male. He then moved to – the adult male then moved to the sink and began spitting blood into the sink.

Q. You could observe blood at that time?

A. Yeah. He actually turned on the water and was cupping water into his hands from the sink, putting it into his mouth and then spitting it back out and it was coming out red.

[23]

Q. At that point did you further determine that there was a danger to the safety of the occupants of the home?

A. There was a fight going on.

Q. Certainly. Did you announce your presence?

A. I opened the door and yelled in police. It was so loud, it was so tumultuous, that nobody heard a word. They were still struggling. They were forcing the juvenile up against the refrigerator so hard that the refrigerator was actually walking.

Q. All right. At that point did you make entry into the home to attempt to secure the situation?

A. I did. I stepped into the home. I still didn't approach them. I again identified myself. Then I yelled, hey, folks, as loud as I could, at which point some of them began to realize I was.

Q. Were you in uniform?

A. Yes, I was.

Q. And did the altercation essentially cease at that time?

A. It dissipated. One by one, as they became aware that I was there, it kind of stopped person by person. It went one, two, three, four, five. They all slowed down, but it didn't stop immediately. They were afraid to release the juvenile. They still held on to him, but he quit fighting when he saw me. In an effort to save anybody else from getting punched I stepped in [24] and began to try and handcuff him because he seemed to be the problem.

Q. All right. Were you assisted in your efforts?

A. Officer DeRyke came to the door right after me. He assisted me in putting him in handcuffs.

Q. How about the occupants of the home, did they attempt to cooperate in their –

MR. GILMORE: Objection, Your Honor. This has nothing to do with the motion to suppress. This gets back to the trial issues.

MR. MERRELL: Your Honor, the reason that I'm asking this is based on the way that the officer – the

necessity for him to be able to take control of the situation. I'm not going to go any further than this. Just what happened right there.

THE COURT: Overruled. He may respond.

Q. (BY MR. MERRELL) Officer Johnson, once again, did the occupants of the home attempt to assist you in the restraining of the juvenile or do you remember what their – how they acted?

A. They immediately turned and became verbally hostile to us.

Q. With us meaning?

A. With Officer DeRyke and myself. They were so verbally hostile that Sergeant Broadhead left his two detainees **[25]** outside and came in to make sure that we were okay, because the agitation and tumultuous behavior that was occurring between the five of them inside the house now turned on us and they became very hostile, potentially violent, towards us, enough to bring Sergeant Broadhead into the home.

MR. GILMORE: Objection.

Q. (BY MR. MERRELL) Your Honor, that's all I'm going to ask except for the fact that later on were you able to restrain the situation and were there any other injuries that occurred to any of the people as a result of their actions towards each other?

A. Officer Trent Gunn was injured during a cuffing incident.

Q. But towards the occupants themselves there weren't any other injuries at that time?

A. No. It took a while to calm down, but we did get it under control.

Q. Officer Johnson, do you believe, based on your training and experience and your knowledge of the law, and I'm asking – I'm not asking you to give a legal opinion, but based on your training and experience and your training on how to apply your observations of the facts in front of you, that what you did was reasonable?

A. I cannot see any way we could have done anything other than what we did. Once again, we were not trying to be intrusive as much as trying to prevent somebody from getting **[26]** hurt. I felt like we did it in as prudent a manner as we could.

MR. MERRELL: All right. Thank you. Appreciate it.

THE COURT: Mr. Gilmore.

CROSS-EXAMINATION

BY MR. GILMORE:

Q. Hello, Officer Johnson.

A. How are you?

Q. Would you tell me again what was the call that you received?

A. A loud party or fight. A kind of tumultuous – it was a noise complaint.

Q. It was a noise complaint?

A. Yes. Dispatched to us as a noise complaint.

Q. A noise complaint?

A. Yes. As if a party or fight were going on.

Q. Now, you at some point, much closer to the incident than now, did write a report, did you not?

A. Yes, I did.

Q. And in that report did you refer to this as a possible fight on the call?

A. No.

Q. No. What did you refer to it as?

A. My very first line in my report is I responded to the area of the noise complaint.

[27]

Q. Noise complaint?

A. Yes.

Q. Did you have occasion to testify about this call at any other time?

A. Yes.

Q. And at that time did you characterize the call as a possible fight or altercation?

A. I don't recall.

Q. If we were to refresh your memory with a video-tape of the previous suppression hearing, would you remember that you only referred to it as a loud party?

A. That may have been the case. I'm not going to dispute that. I don't remember what I responded that day.

Q. All right. Officer Johnson, you stated that there was backup called and that the reason for that was, at the time, simply to secure the premises in case there were juveniles that were going to flee, is that correct?

A. We have a standing policy that everybody available on these kinds of calls goes. There was no backup called. The standing policy is those available units on a loud noise complaint at 3 o'clock in the morning respond. I don't believe there was any radio traffic, that I recall, requesting anybody to come. The four officers who were available at that time came because that's standard protocol.

Q. But earlier in your testimony you did say that the reason [28] for this would be to secure the premises in case juveniles try to flee, correct?

A. That's one of the reasons. And probably the most prevalent reason, because it happens so frequently.

Q. All right.

MR. MERRELL: Your Honor, objection. I'd like him to allow the witness to answer the full question that was asked.

MR. GILMORE: I think he did, Your Honor.

THE COURT: What's your objection?

MR. MERRELL: The objection is he's not allowing the witness to answer the question.

THE COURT: All right. Mr. Gilmore, give him ample opportunity to respond fully and then ask your next question.

THE WITNESS: I'll just say what I said. That's fine. It's the most prevalent reason but not the only reason. There's a myriad of reasons that we respond the way we do on 3 o'clock in the morning loud noise calls.

Q. (BY MR. GILMORE) Okay. Now, you stated that one of the phrases that you heard in the front of the house was get off me, is that correct?

A. That's correct.

Q. Now, is that a phrase that always literally means that one person is physically on top of another?

A. Always, no. In conjunction with the noise we were **[29]** hearing, yes.

Q. It has other meanings, is that what you're saying?

A. I'm saying in conjunction with the other evidence we were detecting, it sounded like somebody was in trouble.

Q. The phrase does have other meanings, does it not?

A. Oh, of course.

Q. And essentially it can mean leave me alone?

A. Yes.

Q. All right. Referring back to your report that you wrote, do you have a copy of it there?

A. Yes, I do.

Q. You state that it was obvious, from the location that you were at, that there was something going on and it was occurring inside, is that correct?

A. In the second paragraph I said that it appeared the problem was occurring in the rear of the home or in the back yard.

Q. And what was the sentence just before that?

A. It was obvious from this location that some sort of altercation was occurring inside.

Q. Inside. Okay. Thank you. When you say that it appeared to you that there was a safety issue, what safety issue did you specifically see?

A. Specifically see?

Q. That you specifically saw?

[30]

A. The only thing I saw from the front of the house was open windows with darkened rooms. Some lights on in the rear of the home.

Q. So from the front of the house you actually did not see any safety issues?

A. Didn't see. Heard a lot, didn't see.

Q. And this is especially true in regard to you and the other officers, you saw nothing that –

A. No, we didn't see anything. That's why we approached closer.

Q. All right. Now, you stated that you first were able to see in the back yard when you went around the house and came to the fence, is that correct?

A. You could see angles into the back yard through the gate that comes off the driveway into the back yard.

You couldn't see an entire view, but you could see specific little things. By moving left and right we could ascertain that there were the two people.

Q. But you had to be right at the fence to do that?

A. Yes.

Q. All right. Now, you also stated that you determined to proceed the way you did, meaning to leave one person in the front and go around to the back, while you were there in the front yard, is that correct?

A. Yes. Sergeant Broadhead determined that Trent Gunn [31] needed to stay at the front door to prevent anyone from fleeing out that door.

Q. All right.

A. And also as a further safety protocol that we have in place for officer safety.

Q. But you also stated that it was after that that you went up to the front porch and peered into the window, is that correct?

A. No. Trent Gunn was left there after we determined we were going to move further.

Q. So the determination was actually made not while you were out in the yard, it was made while you were on the front porch?

A. We approached the front door. I think there was some discussion about knocking. We decided that wasn't very prudent. It wasn't a very intelligent thing to do with what we were hearing. I think at that point Sergeant

Broadhead deemed that Officer Gunn should stay by the front door while we proceeded further to investigate.

Q. All right. Have you ever knocked on the front door in a situation like this?

A. Unfortunately yes, and I've had bad results from it.

Q. What kind of bad results?

A. I've had perpetrators flee out the back door, a tough time identifying them. I've spent months of investigation. **[32]** Sometimes they're identified, sometimes not.

Q. So you were concerned that if you knocked on the front door that there might be a crime being committed and a perpetrator might flee out the back, is that correct?

A. It was something we felt necessary to take into account and adjust into our actions.

Q. All right. Now, when you got to the fence and you noticed the two individuals in the back yard, you noticed something about what appeared to be their age, is that correct?

A. They were obviously under 21 years of age and consuming alcohol.

Q. Have you ever been wrong about that before? Have you ever seen someone and guessed what their age was and never been wrong?

A. Not somebody as young as the 14 year old was that day, no.

Q. Never?

A. You know, I've been wrong with 19 year olds, 20 year olds. But we had a 14 year old there that night and he couldn't have cleared anything past 17. There's just – he was young and he was obviously under the age. There was no question.

Q. Did you – at what point did you make contact with these individuals?

[33]

A. I did not.

Q. You didn't at all?

A. No. Sergeant Broadhead took care of that.

Q. Okay. Did someone make contact – was the first contact made after you went into the back yard or prior to going into the back yard?

A. After we entered – I mean, we entered the back yard. Sergeant Broadhead detained both of those two individuals, because by all evidence it appeared that they were under age and consuming alcohol. And Officer DeRyke and I turned ourselves towards the primary problem, which was what had got us on the property in the first place, the sounds of an altercation and somebody yelling, many people yelling, inside the house.

Q. So from the outside of the fence you were concerned about – you noticed two things. One that there was still some sort of altercation going on somewhere; and, number two, there were two individuals in the back yard that were possibly under age and consuming alcohol, is that correct?

A. I guess that's a close interpretation, yes.

Q. All right. And no one made any contact with those individuals to ascertain their actual age until you did enter into the back yard, is that correct?

A. No, nobody did ascertain or talk to them through the fence.

[34]

Q. So no contact was made and their age – the accuracy of their age was not determined until at least you entered into the back yard, is that correct?

A. Counsel, I'm 43 years of age. Have you ever tried to chase a 14 year old at 43 years of age? I can guarantee you that had I yelled at them through the fence, had that been the response – I'm just saying there was reasons for us contacting them face to face.

Q. So there was a reason for you to do that, that's what you're saying?

A. Yeah.

Q. But you still didn't do it?

A. No, we did not do it, no.

Q. All right. I'd like to have you look at this. Do you recognize that?

MR. MERRELL: Counsel, can I see those pictures?

MR. GILMORE: Yeah.

(Pause in the proceedings.)

THE WITNESS: That appears to me to be the front of the home towards the west side, to the best of my

recollection, if this is the house. I haven't seen it in a while.

MR. GILMORE: I offer this into evidence.

THE COURT: What is it, counsel?

MR. GILMORE: This is a view of the front of the **[35]** house.

THE COURT: How is it marked? We're trying to make a record here. Read into the record what you're showing him and what he identified.

MR. GILMORE: It's exhibit one.

THE COURT: We have defendant's exhibit one. Any objections to the court receiving that, Mr. Merrell?

MR. MERRELL: We don't have any foundation on it, but the state isn't going to make any objection whatsoever.

THE COURT: It will be received.

Q. (BY MR. GILMORE) Do you recognize this photograph?

THE COURT: Again, counsel, what is it?

MR. GILMORE: This is a photograph showing –

THE COURT: Tell me what it's marked as.

MR. GILMORE: I'm sorry. Exhibit two.

THE COURT: All right. Defendants' exhibit number two.

THE WITNESS: That appears to be the east side of the home. The driveway and the path that I remember walking down.

MR. GILMORE: Offer this into evidence.

THE COURT: Any objections to that, counsel?

MR. MERRELL: No.

THE COURT: It will be received.

Q. (BY MR. GILMORE) This is defendants' Exhibit 3. Do you **[36]** recognize that?

A. Once again, I haven't been back to this home since this occurred, but that appears to be the same photograph you just showed me a moment ago, the same fence and side of the house.

Q. Anything different from the other one? Closer or further away?

A. Just a different angle. Maybe closer, I guess.

MR. GILMORE: Offer this as evidence.

THE COURT: Any objections to that, counsel?

MR. MERRELL: No.

THE COURT: Received.

Q. (BY MR. GILMORE) Again, I'll give you defendants' exhibit four and if you would tell me if you recognize that?

A. The same thing, a different angle.

MR. MERRELL: No objection.

THE COURT: Received. You're offering it, I assume, counsel?

MR. GILMORE: Yes.

THE COURT: It will be received.

Q. (BY MR. GILMORE) Defendants' exhibit five, do you recognize that?

A. I believe it's the same home and just, again, a different angle. You're moving further to the east here, if it's the home we're speaking of.

MR. GILMORE: Offer into evidence.

[37]

THE COURT: Mr. Merrell?

MR. MERRELL: No objection.

THE COURT: Received.

Q. (BY MR. GILMORE) Defendants' exhibit six.

A. A wooden fence. It appears to be the fence in the previous pictures, but an extreme closeup of that.

MR. GILMORE: Offer it into evidence.

MR. MERRELL: No objection to fact that it's showing it straight on. A stipulation that it is straight on.

THE COURT: It will be received.

Q. (BY MR. GILMORE) Defendants' exhibit seven, do you recognize that?

A. Yeah. I saw this last time in the dark. It appears to be the rear of the home. The windows we were speaking of in my earlier testimony with the door in the center.

Q. Can you identify which windows you saw – through which windows you saw the action?

A. Because I didn't know what was going on I stopped at both windows. I stopped at the larger window longer than I did the smaller window and then I moved to the screen door. You know, I did look through all three of these for varying lengths before trying to holler police inside.

Q. And can you identify which window you saw – do you know which window is directly in front of the refrigerator?

A. No, I do not.

[38]

MR. GILMORE: Offer as evidence.

MR. MERRELL: No objection.

THE COURT: It will be received.

Q. (BY MR. GILMORE) Now I'll give you defendants' exhibit eight. Do you recognize that one?

A. The same thing, a different angle.

MR. MERRELL: No objection.

THE COURT: Received.

Q. (BY MR. GILMORE) And then defendants' exhibit nine, can you identify that one?

A. The same thing, a straight on angle.

Q. Okay. Do you recognize – do you see the refrigerator in that photograph?

A. No, I do not. I guess it may be – I don't.

MR. GILMORE: All right. Offer as evidence.

MR. MERRELL: No objection.

THE COURT: Received.

Q. (BY MR. GILMORE) This was at 3 o'clock in the morning, officer, when you were there?

A. The time on the report indicates 3 o'clock.

Q. All right. And how much light was there in the back yard?

A. There appeared to be a porch – a dim porch light on.

Q. A dim light from the porch.

A. I don't remember any other lights. Lights emanating from [39] the home, I guess, because there were lights on in the kitchen area, so there would have been a light emanating from – there was some light emanating out into that area, probably through the windows too.

Q. All right. So there was a dim porch light and some possible light that would emanate from the kitchen area through whichever window was there by the kitchen area, is that correct?

A. You're asking me tough questions, because my focus was more, again, on safety issues. I wasn't doing a survey of the home. I can't tell you what lights were

actually on or off as far as what was shining into the back yard. I know I could see through the two windows you just pointed out and there was light emanating from those windows. Beyond that I would really be speculating in regards to my recollection from that night.

Q. Tell me, when you did see – well, let me ask you a different question first. The two juveniles that you observed, were they in an agitated state?

A. No. They didn't appear like they were part of this problem. I didn't see anything to indicate that to me.

Q. All right. From your training and experience, would you anticipate that if there was a fight going on that juvenile males of that age would be relaxed or would be agitated and interested and watching?

[40]

A. Counsel, I've seen the entire spectrum on this. I've seen juvenile males ordered to stay out of it, pushed to other rooms. I've seen them actually be made to leave the home. I've seen juvenile males who can't stay out of it. I think that's respective of the individual family, how much control the adult figures have and how subservient the children are to those things. If you're asking in 16 years, I've seen one end of that to the other. I've seen kids who wouldn't respond at all and kids who were completely subservient.

Q. But they didn't seem particularly concerned about the situation?

A. I didn't see a lot of concern coming from them in the time I watched them, no. They were talking about it and one of them indicated that he's had too much to drink.

I believe that was in reference to what was going on inside but, you know, that's speculation on my part.

Q. Right. Now, you mentioned, officer, that when you observed the juvenile inside the house, you characterized it as him trying to get free, is that correct?

A. I remember his fist was up – very distinctly his fist up and the adults having ahold of his wrists and him wedging, trying to get his fist in this manner out of the grips.

Q. Trying to break free?

A. Yes. And he was twisting and turning and writhing and **[41]** they were trying to press him into some type of control against that refrigerator.

Q. And you specifically said you heard the phrase calm down?

A. Calm down was one of the things I heard. It appeared to me that the adults were trying to calm this juvenile down, yeah. I don't think they were trying to agitate him. It didn't appear that way.

Q. All right. Now, you stated that when you were on the outside of the house looking through the door that you saw the juvenile hit one of the adult males, earlier in your testimony, correct?

A. Yeah.

Q. All right.

A. Just referring back to my notes, but that's what I saw that night, was one of the hands come free of the

juvenile and him land a punch squarely on the face, enough to draw blood from one of the adults.

Q. All right. I want to refer to the report that you wrote. Could you read those two highlighted sentences for me.

A. I will, but this doesn't refer to what I just talked about, which is in the above paragraph. If you're asking me a question to read this in conjunction with what you just asked me, the paragraph above covers that.

Q. Would you please read those.

MR. MERRELL: Mr. Gilmore, counsel, could you tell [42] me where in this that you're talking about?

MR. GILMORE: Yes.

(Pause in the proceedings.)

THE WITNESS: The two highlighted lines, "I stepped through the rear door and said police." And then three or four lines down you have highlighted "the male adult who had been punched was now leaning over the sink, running water from the tap and using his hand to scoop water into his mouth."

Q. (BY MR. GILMORE) Okay. Now, it seemed to me that you said earlier that you saw that occur from the outside of the house, is that correct?

A. I may have said that earlier.

Q. Okay. But here in your report you say first of all you stepped through the door and then saw?

A. I saw the punch from outside the house. The actual scooping of the water was probably more from inside the house.

Q. I haven't heard you say that there was any further punching, nor have I heard you say that there was any attempt at punching, and that you didn't see the juvenile receive any punches or anything like that, only trying to calm him down, is that correct?

MR. MERRELL: Objection. Your Honor, Mr. Gilmore stopped me at that point and I didn't want to go any further. **[43]** I could have gone further. If we'd like to have me examine that area a little further, I certainly could.

THE COURT: Rephrase your question, Mr. Gilmore, and limit it up to the time that Mr. Merrell ceased his direct examination.

MR. GILMORE: All right.

THE COURT: If you want to go further –

MR. GILMORE: Let me ask something concerning the report, may I?

THE COURT: Go ahead.

Q. (BY MR. GILMORE) In the report that you wrote, did you ever mention any other punch or any other threat of punches that you saw?

A. No. In the paragraph before, which I referred to, I said "I observed the juvenile jerk a hand free and punch a male adult who was wearing a white shirt. The punch hit the male adult in the mouth. This caused a flurry of activity that appeared to be an escalation of the situation.

The entire sequence of events took less than ten seconds while I was observing." This all was observed from outside and that punch escalated what was going on.

Q. So at no point in your report did you ever mention anything other than that one punch?

A. And the escalation that occurred afterwards.

Q. All right. Did you notice any injuries?

[44]

A. Yeah.

Q. What injuries did you notice?

A. The male adult was bleeding from the mouth. He used a towel. There was a towel there that he was dabbing his mouth with and drawing blood from his lips and mouth.

Q. Is that person here?

A. Yeah. I later identified him. It was, I believe, Doug Olsen, but I want to look here for just a second. (Pause.) well, I'll have to read through my report long enough to keep us here a while. I believe that –

Q. That's fine with me.

A. I believe that individual was Doug Olsen.

Q. You believe the individual was Doug Olsen. And have you previously identified Doug Olsen as being the adult male that had been punched?

A. Today?

Q. Not today, no, but previously, in the previous suppression hearing?

A. I don't recall. I honestly don't recall.

Q. Now, officer, you mentioned that the situation settled down rather quickly; gradually, but rather quickly, as soon as everyone was made aware of your presence, is that correct?

A. It de-escalated in a step by step basis as each person became aware of the officer, yes.

Q. How close was this altercation to one of the windows [45] there?

A. Oh, probably directly inside that kitchen window by six, seven feet, I would guess.

Q. All right. Did you attempt to get their attention without entering the house?

A. I yelled police from the doorway, yes.

Q. But you did open the door?

A. Yeah. It was loud enough even when I opened the door that they couldn't hear me. I mean, you have to realize how loud this was. I opened the door in an attempt to get some attention. It was so loud that yelling through the door, I might as well walk up and yell at the wall.

Q. Did you attempt to get their attention through the window?

A. No, I did not. That would have been an officer safety issue, where they could have ducked down, brought up a weapon. I wanted to be where I could observe them.

There was obviously a fight going on here. For my safety I wouldn't –

Q. Were you aware of any weapons?

A. No, not at that time, but that doesn't mean there wasn't one.

Q. Was there anything to indicate that there might have been a weapon?

A. You bet. You're in a kitchen. Kitchens are full of **[46]** weapons.

Q. And did anyone say – did you hear anything about a weapon?

A. No, I didn't hear anything about a weapon.

Q. All right. And you were concerned for your safety in the event that you knocked on the window while you were outside the house, is that correct, is that what you just said?

A. With the door that close I couldn't see any prudent or reasonable to knock on a window when a door is as close as you show in those pictures. I mean, if you're going to make contact with somebody, make contact at the door.

Q. On the report I'd like to point to you this highlighted sentence. Can you tell us who you identified as the adult male in that report that received the punch?

A. I put in here "Shayne was still at the sink rinsing his mouth." I got to clarify this that I did not arrest any of these individuals. I did not transport them, I didn't book them. I am not aware if I made a mistake here or not.

Q. All right. So at least at one point there was an identification of one adult male and two other times there's been an identification of a different adult male, is that correct?

A. That's correct. I could be mistaken on my identifications.

MR. GILMORE: Okay. I think that's all.

[47]

THE COURT: Redirect, Mr. Merrell.

MR. MERRELL: Just real quickly.

REDIRECT EXAMINATION

BY MR. MERRELL:

Q. Officer Johnson, counsel asked when you arrived – the context of the call. The call that you received from the dispatcher related to a loud party?

A. That's correct.

Q. When you arrived there, based on your training and experience, did it appear to you, based on what you observed with all of your senses, to be simply a loud party?

A. To clarify, from down at the intersection when Officer DeRyke and I first heard the noise, yeah, it could have been a party. It was loud at the corner, but it could have been a party.

From the corner of the property at the curb, with the articulations that we heard and the thumpings, no. At that point I was not thinking party at all. Neither was any of the officers there.

Q. Have you had experience arriving at loud parties?

A. Many, many, times.

Q. Have you had any experience arriving at disputes at residences, domestic disputes?

A. Again, many, many times.

Q. And based on your experience did you make the decision [48] that this was not the loud party, happy kind of party, but was a domestic dispute kind of problem?

A. There's no happiness here, counsel, I can tell you that. In using that term, there was not. This was some kind of altercation involving a dispute or anger and it was not your frivolous loud juveniles or adults drinking and having a good time with music playing kind of party. This was an altercation.

Q. Officer Johnson, if you had arrived at that residence and all you heard were the sounds that were, in your training and experience, representative of a loud party, would you have proceeded the same way you did in this instance?

A. No. There would have been a different set of protocols enacted.

Q. Officer Johnson, are you trained in the use of other of your senses other than your sight and vision?

A. Yes.

Q. Give me some examples. How about your smell, are you trained in the use of your smell?

A. Yes. Oftentimes I detect drug use by the use of smell. I can detect alcohol use by the sense of smell. Other violations by the sense of smeli.

Q. In fact, are you trained in the detection of the odor of marijuana to the extent that you're allowed to search a vehicle based on your detection of the order [sic] of marijuana?

[49]

A. I believe with my experience the court would accept a determination of –

MR. GILMORE: Objection. That's purely speculation.

THE COURT: The objection is sustained.

Q. (BY MR. MERRELL) How about hearing, have you had experience and training your hearing to –

A. Training and extensive experience in hearing different kinds of problems.

Q. And as an officer are you obligated to use all of your senses in the best way you can to determine what is occurring in a particular situation?

A. The answer to that I guess would be yes.

Q. So you're not restrained only to your sight?

A. No.

Q. All right. Thank you, officer. Officer Johnson, when you arrived at the fence and looked in the fence at the back, was the light sufficient to be able – the light coming from the house, coming from the dimly lighted

bulb on the back of the house, sufficient to be able to observe the juveniles?

A. Yes.

Q. You could observe, based on that light, what ages they appeared to be?

A. One of them actually came from the rear door area when we first arrived there and walked over to the table. I saw part of that walking and sitting down at the table. Yeah, I could **[50]** see him fairly clearly coming out of the lighted area over towards the table.

Q. All right. Officer Johnson, in your training and experience, if the juvenile males had had some alcohol to drink at that time, is it potentially the situation that they could have – that they would have been more or less likely to (unintelligible).

MR. GILMORE: Objection. That calls for a conclusion.

MR. MERRELL: Well, let me finish.

Q. (BY MR. MERRELL) That they would have been more or less likely to –

THE COURT: I'll sustain the objection as leading.

Q. (BY MR. MERRELL) Officer Johnson, do you have training and experience in observing juveniles that have been drinking?

A. Training and experience, yes.

Q. In observing juveniles that have been drinking, do they become more calm or more agitated when they drink?

A. Again, that's an individual thing, but there are – there are juveniles who become calmer. There are also juveniles who become more agitated and present problems.

Q. All right. When you observed these juveniles, were they drinking?

A. Yes, they were.

[51]

Q. Would it have been possible, based on your training and experience, that these juveniles were more relaxed as a result of their drinking?

MR. GILMORE: Objection. That calls for speculation.

~~THE COURT:~~ I think he can respond.

THE WITNESS: It's possible. Obviously, as I said before, some juveniles become calmer as do adults. The contrary occurs in some individuals, too.

Q. (BY MR. MERRELL) Officer Johnson, when you arrived at the door – there appeared to be some indication by counsel's questions that perhaps the – that the defense believes the occupants of the home were appropriately restraining this youth and that they had the situation perhaps under control?

A. I saw no control.

Q. Did it appear to you that they were going to be successful in restraining this juvenile without further

problems occurring and safety situations and safety concerns being – arising at that time?

A. It didn't appear to me that this was a situation that would readily resolve itself.

Q. And based on your training and experience, do you have training and experience in resolving situations like this where there is an altercation that is underway?

A. I believe that's part of our public duty. That's what we [52] do.

Q. All right. Is that why you entered the home?

A. I entered the home because people were being hurt.

Q. All right. Once you saw a punch being thrown, what does that do with respect to your heightened level of interest or your perspective on the safety issues?

A. Obviously a crime was just committed. People are at risk and are in danger. There's an obligation in the police function to intervene at that point.

Q. All right. Counsel made a representation to you that perhaps the person that was punched was Shayne Stuart rather than Doug Olsen. Does it matter to you at all, and would it have mattered to your entry into the home at that time whatsoever, the name or who the person was that was punched?

A. No, sir, it wouldn't. There was a violation and the names were not applicable to the crime.

Q. All right. At the time that you observed what was occurring in there, you stated that you had concern for

your safety as a result of it happening in the kitchen and the possibility of a weapon?

A. We are trained, and based on experience, personal, the kitchen is a dangerous place. There are access to many hidden weapons in a kitchen. We always operate in a kitchen environment in a heightened state of officer safety and security. There are many, many reasons for that. All of us **[53]** can think of our own kitchen and how many weapons are available in a kitchen environment.

Q. Officer Johnson, were you also concerned for the safety of the occupants of the home at that time?

A. Yes, I was.

Q. Was the window that you observed this through opened or closed, do you recall?

A. You could see through it clearly.

Q. But was it opened?

A. You mean as far as –

Q. Could you – would you have been able –

A. The windows were closed. I don't remember any windows being ajar or open.

Q. In common sense, would it have made more sense to converse with the occupants through a screen door than through a closed window?

A. I can't think of any time when a door has been that close that I've tried to make contact through a window, nor would I understand a reason to do that.

MR. MERRELL: All right. Thank you, officer.

THE COURT: Mr. Gilmore.

RECROSS-EXAMINATION

BY MR. GILMORE:

Q. Officer, did you hear any injury?

A. Hear?

[54]

Q. Uh-huh.

A. I guess I heard the individual at the sink spitting blood.

Q. You didn't hear any injury, though, right?

A. No.

Q. Did you smell any injury?

A. No, I didn't smell any injury.

Q. All right. It appears that at one point you thought there might have been an injury, is that correct?

A. At one point I observed an individual at a sink spitting blood into both the sink and a towel, which to me is an injury that was caused by the punch I saw thrown.

Q. And that wasn't until you were already in the back yard?

A. Yes, I was in the back yard when I saw that.

Q. All right. Was there – did you see or hear any threat to life or limb specifically?

A. Specific threats to life or limb, there was a lot of swearing going on and threats being exchanged, as there are in fights. You know, there were no threats to life that

I recall. But obviously there were comments made, you know, in the heat of the moment that very easily could have been deemed as a threat to limb because they were threatening each other. The young juvenile was definitely threatening, you know.

This situation had three to five people yelling [55] simultaneously. They were not yelling pleasantries to each other. They were yelling threats. They were yelling in an effort to calm the situation down and the other half was yelling in an effort to say you let go of me or else kind of thing. This was tumultuous. And if you're asking me if I deemed that as a threat to limb, yeah, I do.

Q. That was just a subjective thought on your part? You didn't see anything specific that would indicate a definite threat to life or limb, is that correct?

A. No threat to life. I did see threat to limb because of the violence in the situation involved.

Q. A specific threat, a weapon, a chance for –

A. I don't think you need a weapon, when there's a fight going on, to get your limbs – the way the law defines it.

Q. You indicated that the adults were restraining the juvenile and that at one time one of the juvenile's hands came free and he was struggling and flailing, is that correct?

A. Yeah.

Q. Now, if indeed one of the adults was struck, assuming that that's true, it's possible that that was simply an accident from the struggling, is that correct?

A. No. He swung the punch and landed it.

Q. You could see his intent?

A. I could see the punch land where he aimed it.

[56]

Q. I see. Now, when you went in did you offer any medical treatment to anyone?

A. Yeah, I did.

Q. What treatment did you offer?

A. I went over to ask if he was okay and if he needed any help. I was ordered out of the home.

Q. So you complied?

A. No.

Q. Oh?

A. No. There were people going to be taken into custody for the assault.

Q. The juvenile?

A. The juvenile was already in custody at that point. I went over to see if he needed any help and these people were not in the mood to really converse calmly with anyone at that point. I was – the repeated comments we got were that our presence wasn't needed.

Q. Was there blood on the – on one of the adult males when he was arrested?

A. I don't recall. I didn't place him into handcuffs. I didn't transport him, I didn't book him.

Q. Was there blood all over that white shirt?

A. I don't recall.

Q. But you were there, right?

A. Yeah, I was. I was dealing with other things and I don't [57] recall that.

Q. Was there blood on the walls or anything?

A. No, not that I recall. The towel is the only thing I remember blood on.

Q. Okay. And did you offer medical assistance to anyone else?

A. I didn't see anyone else injured.

Q. Did you check to see if there were any?

A. If you mean did I ask anybody else if they were injured?

Q. Correct.

A. I don't recall if anybody was checking to see if anybody else was injured. I don't think there was.

Q. So actually injury was not a really big concern of yours at that time, was it?

A. It was, you bet it was. Injury was a concern of mine for entering the home, because I saw somebody get injured and I didn't know who else was injured prior to my observing what I saw.

Q. Can you tell us exactly how serious the injury was that you observed and what kind of treatment it required?

A. I'm not a doctor.

MR. MERRELL: Objection. I'm not sure if I understand the relevance of this. We understand that there was a fist that was thrown and that connected against a face. I think that we can all probably stipulate that that is [58] something that the officer should intervene on. If we're going to go forward and try and talk about what happened later on and what the officer's investigation determined, we might as well have the whole trial right now.

THE COURT: I don't think Mr. Gilmore is willing to stipulate that that's something that he should have intervened in or he wouldn't be here today, but we are going a little bit further than the direct examination.

MR. GILMORE: Let me illustrate why I ask that question, Your Honor. There is – whether or not the circumstances were exigent and required the intervention, some of the cases say that you've got to show that there was a threat of danger to life or limb. That is, serious bodily injury. All I've heard so far, if anything actually happened. I have a question as to whether there was any injury whatsoever. There's no evidence of any other than what this office said. And he's identified two different people having received that injury. The most you can say is there was a bloody lip.

THE COURT: You may pursue this, but let's not get bogged down in it. And only for the aspect as to, quite frankly, whether or not he thought he should go in to administer aid at that point in time.

MR. GILMORE: I'm sorry. I didn't hear you.

THE COURT: The only reason why I'm allowing you to [59] go into this is to see whether or not this

individual thought that aid needed to be given to the person already injured. The other question is whether other injuries going to occur. That's the only thing that the court it [sic] concentrating on, so limit your questions to that.

Q. (BY MR. GILMORE) Did you examine the person that you claim you saw struck?

A. They would not allow me to examine him.

Q. After he was handcuffed he didn't –

A. I didn't handcuff him.

Q. Were you there afterward?

A. When he was handcuffed?

Q. Yes.

A. I never had any contact with him in a manner that way. I didn't place him under arrest.

Q. Do you happen to know whether or not anybody else examined him to see if he needed treatment?

A. I don't know that. I'm sure he was examined at the jail. It's required policy, that I do know.

Q. And do you know whether or not any treatment was offered at the jail?

A. I do not.

Q. To anyone?

A. I was not at the jail.

MR. GILMORE: Okay. Thank you very much.

[60]

THE COURT: Anything further, Mr. Merrell?

MR. MERRELL: Just a couple of questions.

FURTHER REDIRECT EXAMINATION

BY MR. MERRELL:

Q. Counsel represented that what you observed from the side of the house and as you were walking down the driveway, and what you heard as you entered in through the fence on the side, was based on your subjective thought that there was an altercation occurring in the back. What's that subjective thought grounded in?

A. I'm not sure I understand the question.

Q. Do you have training and experience that would give some foundation to that subjective thought?

A. Yes. I've heard many fights. I've heard many angry, tumultuous conflicts. This sounded like another one.

Q. Did you have any reason to believe whatsoever, on a reasonable basis, that this was anything but an altercation that could have had serious consequences?

A. Had I felt it was anything else we wouldn't have proceeded in the manner we did. Simply the reason we proceeded the way we did is because we felt, and I felt, that we had an altercation occurring.

Q. Counsel asked you a question if you actually saw an injury occur before you actually entered into the back yard and went into the area there?

[61]

A. No, I did not.

Q. Does it make sense, and based on your training and experience, to actually see injuries with your eyes before the police officer – before a police officer should intervene into a situation?

A. Counsel, I think if I entered onto your curtilage and heard you screaming for help and left, my job at a minimum would be in jeopardy. I think when somebody is yelling for help and when you hear a fight going on, there's a basis for us to investigate that.

Q. When you arrive at a domestic violence situation and you hear an argument going on behind a door, say it's an apartment building or something, do you – you haven't seen an injury occur at that time, have you?

A. No.

Q. But do you continue to investigate at that time also?

A. Obviously, yes.

Q. Is that what you've been trained – the way you've been trained?

A. That's the way it should be, yes.

Q. Based on everything that you saw and everything that you observed upon all of your senses, was it reasonable for you to go into the back yard?

A. Yes.

Q. Would it have been unreasonable, based on your training [62] and experience, to not enter the back yard and go in and find out what was happening in the back?

A. Very much so.

MR. MERRELL: Thank you, Officer Johnson.

THE COURT: Anything further, Mr. Gilmore?

MR. GILMORE: Very briefly, Your Honor.

FURTHER RECROSS-EXAMINATION

BY MR. GILMORE:

Q. Officer you stated that you didn't examine the adult male that had been struck because you didn't handcuff him, is that correct?

A. I think, when I first approached him and asked him if he was all right, I received a diatribe of hostility back. There was no cooperation there. You understand how that goes.

Q. And you stated that – I asked if you examined him after he was handcuffed and you said you weren't there, you didn't handcuff him, is that correct?

A. I was not the one who handcuffed him.

Q. I'd like you to read this highlighted sentence in your report, please.

A. It says I walked over and handcuffed Shayne, but I'm not sure that my report here is correct. Like I said, if I've got the wrong name in the report, that's a possibility.

Q. All right. Would you please read the highlighted – the [63] first highlighted sentence on the previous page.

A. "I put Shauna in a wrist lock and handcuffed her."

Q. Thank you. So is it possible that your report is wrong in both regards, when you state you didn't handcuff anybody and your report says you did handcuff –

A. I didn't handcuff any of the males that I recall. I do remember talking to the two females over on the couch by the window. Yeah, I did handcuff both of them.

Q. You did handcuff both of the females, then?

A. Yes, I did, because that's where I was stationed to stand at the time. And to keep those two from –

Q. So what you're stating here is that it's entirely possible that your report is incorrect?

A. In what manner? In what area are you referring to?

Q. Well, I asked you if you – you said you hadn't handcuffed anybody and then you said you hadn't handcuffed the person who was –

A. I'll clarify that. I did not handcuff the males that resisted. That was done by Officer Gunn and Sergeant Broadhead. I did handcuff the females. I ended up not booking anyone. I did not transport any of the adults, that I recall. I transported the juveniles to Archway. We had differing duties as this thing unfolded. I did place the two females in handcuffs, I do recall that very clearly.

Q. Okay. So where it says I walked over and handcuffed **[64]** Shayne, what you're saying is that your report might be wrong?

A. It may be there, yeah. That line may be incorrect. I'm not real clear on that.

Q. But this was done a lot closer to that time, correct?

A. Probably within 48 hours of the incident.

Q. And the intent of writing a report like this is so you do remember, is that correct?

A. That's correct.

Q. And that you do get it correct?

A. That's correct.

Q. When it comes time to testify?

A. But I'll tell you right now, counsel, I've been wrong before.

MR. GILMORE: I see. Okay. Thank you very much.

THE COURT: Thank you. You may step down.

MR. MERRELL: The City would rest at this time.

THE COURT: Mr. Gilmore.

MR. GILMORE: I don't think we'll call any witnesses, Your Honor.

THE COURT: Closing argument. Again, Mr. Gilmore, it's your motion. Even though it's the state's

burden I'll give you the opportunity to address the court first.

MR. GILMORE: Your Honor, I think it's important to bear in mind that, as has been pointed out in a large number **[65]** of cases, especially starting with Katz, that warrantless entry into a person's home is the chief evil against which the Fourth Amendment is directed. This is not just some sort of procedural hurdle that police officers need to overcome. It's characterized as an evil and it's characterized as something that needs to be guarded against, such that a warrantless entry into a home is per se unreasonable except in regard to certain very few exceptions. Those are well established. They have to be well delineated and they have to be very specific in nature.

In addition, if there is going to be a warrantless entry, State versus Beavers makes it very clear that there needs to be not only exigent circumstances to support a warrantless entry into the home, but there has to be probable cause. There needs to be some sort of probable cause that a crime has been committed; and exigent circumstances that warrant the police acting immediately in entering into a home rather than waiting.

Obviously we don't have hot pursuit of a fleeing suspect. We don't have any claim that there was going to be any type of evidence destroyed. And we don't have anything specific that could be articulated as to what particular threat there was to any of the officers. The only thing that we have at most is the claim that there was an injury to some person. Oddly enough, the officer points out that there wasn't a **[66]** further threat. That whatever happened had already happened. He was already separated from the individual taking care of whatever injury

was claimed to have been – needing attention. That was already – that part was definitely already under control.

In addition, the Court of Appeals has pointed out that – well, the Supreme Court has pointed out that if you're going to rely on exigent circumstances that doesn't apply to minor offenses. In Welch versus Wisconsin the Supreme Court made that clear. You might have some sort of exigent circumstances there, and possibly some probable cause, but if the underlying offense is a minor offense then these warrantless exceptions simply don't apply to that.

That's basically what we have here. We have a minor – if there's any offense that was seen prior to the entry of the home, it's a minor offense. Actually, it appears that it wasn't clear whether what they saw was before or after they entered the home. If it was after they entered the home, then there simply is no probable cause nor exigent circumstance that warrants the entry into the home. That is the critical issue, Your Honor.

Prior to that they already had entered the back yard. They had already gone down the curtilage of the home where, our contention is, there's a privacy interest there. No probable cause nor exigent circumstances at that point.

[67]

They entered into the back yard. Again, no probable cause nor exigent circumstances at that point. The most that has ever been argued is that after viewing a situation, once they've already entered into the back yard, then they're claiming that some minor injury that they saw occur created exigent circumstances to then enter into the house. But that had already ceased. Once the person is – if

there was any danger, once that person is out of danger then the exigent circumstance [sic] no longer exist.

It sounds as though the prosecution is relying upon some plain view offenses to bolster their claim that it's okay to go into these areas that have a protective privacy interest. What they're saying at most is that from viewing some juveniles they thought might be under age, they might be drinking alcohol, but there was no verification of that until they'd already entered into the back yard. That at most gives rise to reasonable suspicion to continue an investigation, to ask for identification, to see how old they actually were perhaps. That does not give rise to probable cause. Especially it doesn't give rise to a probable cause of a serious offense. Nor at that point were there any exigent circumstances.

In addition, Your Honor, it appears that the officers went well beyond the scope of any exigent circumstances that existed once they entered into the home. It was clear that **[68]** the person who – if anyone was in danger, the person who was placed in danger, or could possibly have been in harm's way, or they claim was in harm's way, was already separated from the other individual. That's the extent to which they could have gone. Once the exigency has been met, that's as far as they can go.

In summation, Your Honor, the prosecution has not asked the court to find exigent circumstances according to something that has been specifically established by law; not according to any well delineated set of exigent circumstances that have already been recognized. They're asking this court basically to expand that recognition and create some new exception to the warrantless entry requirement.

I'd like to point out that probable cause and exigent circumstances, the standard there is not the subjective standard of reasonableness according to the officer in the field. Probable cause is always an objective standard, regardless of an officer's training, regardless of his experience. This is one of the reasons that warrants need to be ruled upon by a neutral magistrate, so that whether or not there is probable cause can be determined objectively. It's not a subjective matter whatsoever.

If suddenly this has become a subjective matter then there is protection to the Fourth Amendment. That surely minimizes what has been termed a protection against a chief **[69]** evil that the Fourth Amendment was designed to raise boundaries to protect the citizens against. Thank you, Your Honor.

THE COURT: Mr. Merrell.

MR. MERRELL: Thank you, Judge. Counsel has made great arguments and I appreciate his arguments, but I do believe that we've certainly brought into evidence everything that's necessary to deny this motion to suppress at this time.

The officer testified that as he arrived at the home he heard fighting and noises, noises coming from the back of the house. He observed alcohol at the front of the house. They observed, based on their training and experience, exactly what would constitute, number one, an exigent circumstance based on a possible law violation. And, number two, an exigent circumstance based on safety of the occupants of the home.

Mr. Gilmore attempts to somehow belittle the safety factor. It's not only the potential violation of a law that the

officers are observing. Officers may be able to enter onto property based on their reasonable belief that a safety violation is occurring to aid another, an occupant of a home, whether or not they believe that an actual legal violation, criminal violation, is occurring at that time. And should they observe criminal violations other than what was observed **[70]** when they entered into the home, the residence, based on what their safety concerns were, that evidence would not be excluded because exigent circumstances incorporates the safety issue, not just the criminal issue.

But the officers here determined, based on their training and experience, that they had a reasonable belief and that is what the standard is. It's not just an objective standard based on what Mr. Gilmore thinks or what the Supreme Court thinks. It's an objective standard based on what this officer believes and what – it says in State versus Wells, "The existence of exigent circumstances must be based on the reasonable belief of the police officer."

He's testified today that he reasonably believed, based on his training and experience, 16 years of training and experience, that there was an altercation that was occurring in the back of this home that needed to be attended to in the way it was attended to. That were they to go to the front of the house, knock on the door, that, number one, there could have been safety issues that could have occurred to the officers; safety issues that could have occurred to the occupants of the home. And as opposed to what Mr. Gilmore states, evidence could have been lost. He stated – Officer Johnson stated that people could have fled at that point, as has been his experience.

As opposed to what Mr. Gilmore states that it must be [71] more than a minor violation of the law, I really have no objection with that. Certainly that is the law, that if the minor violation of the law is a code violation and they see that perhaps there is something wrong with the house, they can't necessarily go in the back and investigate further than that.

What occurred here was something much more serious. It was what appeared, in the training and experience of the officer, to be a dangerous situation, an assaultive situation, a domestic violence situation. What the court stated in State versus Beavers, which was cited by counsel, is "the court has defined exigent circumstances as those that would cause a reasonable person to believe that entry was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts."

So the standard certainly is reasonable officer. Officer Johnson stated that in his training and experience he cannot see any other way that they could have possibly proceeded in this that would have been reasonable under the circumstances.

With respect to the plain view argument stated by counsel, that somehow the officers needed to make a further determination that the juveniles, the individuals who appeared to be juveniles through the fence, were in fact [72] juveniles and were in fact consuming alcohol, the Utah Court of Appeals stated that "an officer must only have a reasonable belief that certain items may be useful as evidence of a crime. It does not demand any showing

that such a belief be correct. A practical nontechnical probability that incriminating evidence is involved is all that's required." That's State versus Kahr, citing a Utah Supreme Court case Texas versus Brown.

Your Honor, had the officers not entered – had Officer Johnson not seen what occurred in this incident and observed and intervened, we don't know what would have happened. Officer Johnson testified, as he stated in his report, that after this punch was thrown the situation escalated. The situation became more – there was more commotion going on. It wasn't defused by the exit of the one individual that was punched. In fact, it probably became worse because there were less people restraining him at that time. Officer Johnson felt reasonably that he needed to enter into the home and take control of the situation, which he did.

The city would submit it.

MR. GILMORE: Your Honor, the prosecution's approach to this issue of exigent circumstances and probable cause makes light of the statement that the Supreme Court has made that it is a particularly heavy burden for the prosecution to show that what the officers have done falls within that [73] exception. What they are basically arguing is virtually at any time, if they can make the statement that they reasonably this or that, they can enter onto the private property of an individual. That's not a particularly heavy burden whatsoever.

The exceptions were carved out to the warrant requirement and when that happened the Supreme Court specifically stated that these should be well established exceptions. They should be well delineated. They should be specifically established, well delineated and they should be

few in number. The prosecution hasn't shown that this falls within that category whatsoever.

State versus Beavers makes it very clear that when you're talking about the possibility, the threat, of harm to an individual, it's not just a matter of some minor harm. You're talking about serious bodily injury or threat of life or limb. I believe that that's exactly the – they quote U.S. versus Bute, I believe, in the life or limb characterization.

What degree of personal harm, what degree of harm to an individual, warrants the intrusion into a private residence? What degree of a minor offense – what degree of an offense warrants an intrusion into a private residence? It was clear in State versus Rosted that a DUI was not going to be serious enough. As a matter of fact, Justice Renquist made the – in **[74]** his dissent clearly thought that it had to be a felony and that misdemeanors were excepted.

State versus Persiphal makes it very clear that there must be some serious bodily injury that is threatened and there needs to be some specific threat of bodily injury.

Then we come to the issue do we have here reasonable suspicion to investigate further and see what the situation is, or do we actually have probable cause of the commission of a crime? And at what point do we have that? Is it before – certainly there is no probable cause before walking down the driveway and entering onto the curtilage area of the home. Certainly there's no probable cause when they entered through the gate into the back door. And there is a question as to whether or not they had probable cause of any serious offense once they're in the back yard.

Added to that, there's no claim of exigent circumstances until they're also in the back yard. That exigency must be a serious exigency and the offense that they're claiming must be a serious offense. The Court of Appeals made it very clear, in determining whether you've got a minor offense or not, is that we're looking not just at the offense itself. We are comparing the offense to the protection of the Fourth Amendment. That's a serious protection. That's a specific protection. That protection overrides an awful lot of things.

[75]

They've got to be able to say that the offense that they're claiming to have probable cause concerning and the exigency overrides that serious major protection of the Fourth Amendment to the United States Constitution. I haven't seen any real attempt at that. All that they've ever said is that the officer at the time, in the circumstances, according to his own personal set of belief and training, thought that it was reasonable.

It's quite clear that constitutional protections are not placed in the hands of officers in the field to make that decision. That is something that is reserved for a neutral magistrate, a neutral judge. If he can't show that it would have objectively met that standard, then it doesn't meet the standard.

Your Honor, there simply was no exigent circumstance that warranted an intrusion onto this private property. There was no major offense, there was nothing but minor offenses, that were even claimed. As a matter of fact, I don't even believe that the offense that they're claiming to have seen, that triggered the whole thing, was ever charged to anyone. The officer's whole action belied the

existence of any injury or any threat of injury to anyone. No one was treated, no one was claimed to have been injured on the book-in reports. There was no blood on anyone's shirt. There was no real evidence of any injury nor any substantial evidence that **[76]** could be reasonably articulated that was a threat to life or limb here, Your Honor.

THE COURT: Thank you, counsel. In ruling on this, let me refer to a few things. As relates to houses and the Fourth Amendment protection, there's a case of United States versus Albrechtsen, 151 Fed 3rd 921, that says as follows: "Nowhere is the protective force of the Fourth Amendment more powerful than it is when the sanctity of the home is involved. The sanctity of a person's home, perhaps our last real retreat in this technological age, lies at the very core of the rights which animate the amendment. Therefore we have been adamant in our demand that absent exigent circumstances a warrant will be required before a person's home is invaded by the authority."

Then the next question is what would comprise exigent circumstances? I'll refer to another case, that of United States versus, I guess it's Wihbey. W-i-h-b-e-y. 75 Fed 3rd 761. "The constitution requires that police normally obtain a warrant before entering a person's home to make an arrest. In determining whether an exigency justifies a warrantless search and seizure, the test is whether there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant. Exigency determinations are generally fact intensive and must be made on a case by case basis."

[77]

On evaluating it on a case by case basis, they have set forth certain things which comprise or would make an exigent circumstance. In United States versus Reed, 69 Fed. 3rd 1109, some of these have been recognized. It says, "Recognized situations in which exigent circumstances exist include danger of flight or escape. Danger of harm to police officers or the general public. Risk of loss, destruction or removal or concealment of evidence and hot pursuit of the fleeing subject."

Now, the case before the court, when I evaluate this on a case by case basis, the court finds that there were – it is an interesting case. This is a very interesting case. I think this is really where the appellate courts have said you have to determine it on a case by case basis.

When Officer Johnson and his compatriots arrived at the scene they were out front. From his testimony it was obvious that knocking on the door wouldn't have done any good, knocking on the front door. The court finds that his actions in going down the driveway were appropriate.

When he got to the slat fence he could look inside the slats and see two juveniles who were drinking at that point in time. Again, we're getting into a gray area now. Did he have probable cause to go in that area? The court finds that he did, when they entered that area at that point in time, because there were two juveniles he could see drinking.

[78]

Then he knew that there was an altercation going on in the home. He went up to the windows and he observed, at that point in time, an altercation taking place. Four

adults had a juvenile apparently in some sort of – apparently trying to control him. The juvenile at one point got a hand loose and smacked somebody in the nose.

The court does not find at that point in time that exigent circumstances existed to just willy-nilly go through the door. He could have knocked on that door. Even though his testimony was that there was a loud tumultuous thing going on in there and they probably wouldn't have heard him, he has an obligation at that point in time, imposed by the Fourth Amendment of the constitution, to at least attempt that. You just don't go in somebody's house. You knock on the door and you say what's going on. At that point in time, if then they have resisted or something, it could have led to something else, but he didn't do that. The officer just went in right through the door and you don't do that.

MR. MERRELL: Your Honor –

THE COURT: No, Mr. Merrell.

MR. MERRELL: Can I just say one thing?

THE COURT: No, you can't. You already had your opportunity. I'm not here to argue with you.

MR. MERRELL: That mischaracterizes the testimony, though. The testimony was that he announced himself.

[79]

THE COURT: Mr. Merrell, I'm not here to argue with you. You've said what you had to say. The court is making its ruling.

MR. MERRELL: He announced himself and nobody heard him.

THE COURT: Mr. Merrell, do you hear me?

MR. MERRELL: Yes, I do.

THE COURT: Do you see this bailiff over here?

MR. MERRELL: Yes, I do.

THE COURT: You know she can take you back to that little holding cell back there, do you understand that?

MR. MERRELL: I understand that.

THE COURT: All right. Then control yourself. That will be the ruling of the court. Mr. Gilmore, will you prepare the appropriate order?

MR. GILMORE: I will, Your Honor.

THE COURT: I'm not sure how this affects the outcome of this trial. What this means is that anything that was seized after the intrusion into the house is subject to your motion to suppress. The court hasn't heard whatever that evidence may be.

MR. GILMORE: Thank you, Your Honor.

THE COURT: Very well.

(Concluded at 3:50 p.m.)